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JP

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Apps EXAMINER: Castellano, S.

SERIAL NO.: 09/780,073 GROUP ART UNIT: 3727

#12/ appeal
Brief
12/2/02

FILED: February 9, 2001

FOR: NESTABLE CAN TRAY WITH CONTOURED WALL STRUCTURE

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Box AF
Assistant Commissioner of Patents & Trademarks
United States Patent & Trademark Office
Washington, D.C. 20231

APPEAL BRIEF

Dear Sir:

Real Party in Interest

The real party in interest is Rehrig Pacific Company, the Assignee of the entire right and interest in this application.

Related Appeals and Interferences

There are no related appeals and interferences.

Status of the Claims

All of the pending claims, claims 1-20, are rejected and appealed.

Status of Amendments

There are no unentered amendments.

CERTIFICATE OF MAIL

I hereby certify that the enclosed Appeal Brief (in triplicate) and fee are being deposited with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to Box AF, Assistant Commissioner of Patents, United States Patent & Trademark Office, Washington D.C. 20231 on November 18, 2002.

Konstantine J. Diamond

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01 FC:1253
02 FC:1402

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Summary of the Invention

The present invention relates to a low depth, nestable tray for transporting and storing beverage containers, such as twelve ounce aluminum beverage cans. Plastic trays with side walls that are lower than the height of the stored containers are referred to as "low depth trays." Since the containers (e.g. the beverage cans) placed in these trays would extend above the side walls, the containers in the lower tray support the weight of the trays stacked on top of them. When empty, many can trays are configured to be nestable within one another to reduce the amount of space they take up during transport. Generally, the known trays comprise a floor, a band spaced from the floor and a plurality of columns interconnecting the floor and the band. In general, the columns are arranged at the corners and along the end walls and side walls of the trays.

Often, the beverage cans are bundled together with a secondary packaging, such as an overwrap or paperboard wrap. The column and band construction of prior trays interferes with the handling of the cans that are bundled together and damages the secondary packaging. The corners and the longer side walls present areas in which interference with secondary packaging has been experienced.

In the present invention, the band is angled downwardly from the horizontal or contoured in certain areas to contact the floor itself, thereby eliminating a column. This reduces interference with the secondary packaging of the beverage cans. As can be seen in the preferred embodiment shown in Figure 1, the band 14 is contoured downward at the corners, thereby eliminating the corner columns. The band 14 is also contoured down to the floor at least once along each side wall. The elimination of the corner columns and a column on each side wall significantly reduces any interference or damage to the secondary packaging around multi-packs of beverage cans.

This feature is claimed in each of the independent claims currently pending. Claim 1 recites that "said band is contoured downwardly to form a band corner portion that directly connects to the floor structure at each corner of said tray." Claim 6 recites that "said band is contoured downwardly along the side portions to form a band central portion that directly connects the floor structure at the side portions of said tray." Claim 13 recites that "said band is contoured downwardly

along the side portions to form a band side detail that directly connects to the floor structure at the side portions of said tray.”

Issues

The final rejection of claims 1-3, 5-7 and 9-20 35 U.S.C. §102 as being anticipated by Apps (U.S. Patent No. 5,323,925) is improper.

The final rejection of claims 4 and 8 under 35 U.S.C. §103 as obvious over Apps in view of David (U.S. Patent No. 4,079,077) is improper.

Grouping of Claims

The rejection of claims 1-20 is contested.

For purposes of this appeal only and based upon the underlying rejection being appealed, Appellant groups the claims as follows:

Claims 1, 3, 5, 9, 11-12, and 15-20 stand or fall together.

Claims 2 and 14 are independently patentable even if claims 1 and 13 are not patentable.

Claims 6 and 13 are independently patentable even if claims 1 and 13 are not patentable.

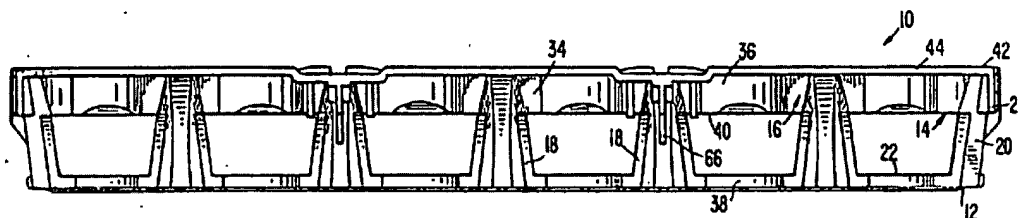
Claim 7 is independently patentable even if claim 6 is not patentable.

Claim 10 is independently patentable even if claim 6 is not patentable.

Claims 4 and 8 are independently patentable even if claim 1 is not.

Argument

The Examiner has rejected claims 1-3, 5-7 and 9-20 under 35 U.S.C. §102 as being anticipated by Apps (U.S. Patent No. 5,323,925). Apps discloses a tray comprising “an enclosing rail 16 maintained in vertically spaced relation with respect to the floor by means of a plurality of columns 18 disposed in longitudinally spaced relation about the periphery of the apparatus” (column 5, lines 25-28; Fig. 5, reproduced below). Apps further discloses that “support[s] posts 20 located at each of the four corners of the tray serve to maintain the rail 16 in spaced relation to the floor 12 and provide additional corner support for the tray 10” (column 5, lines 29-32). This is generally the tray described in Appellant’s “BACKGROUND OF THE INVENTION” section of the application.



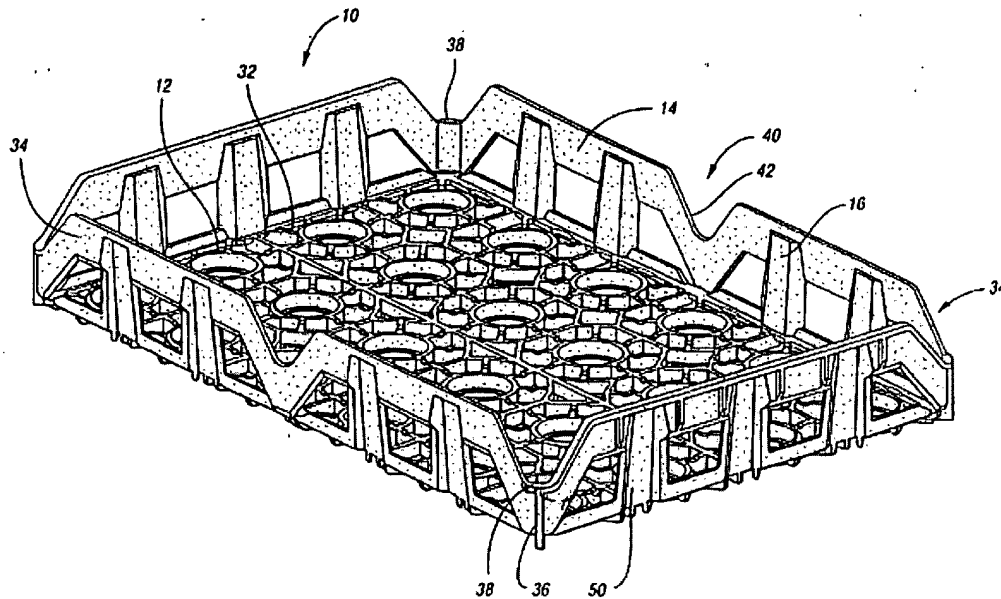
Apps, Figure 5

As can be seen in Figure 5 of Apps above, the rail 16 of Apps is not “contoured downwardly to form a band corner portion that directly connects to the floor structure at each corner of said tray” as required by claim 1. The Examiner has referred to the rail 16 and corner post 20 of Apps collectively as “the band” to try to meet this requirement of claim 1. This is incorrect for two reasons. First, although the Examiner is permitted to interpret the claims broadly, the Examiner’s interpretation must still be reasonable and must be the “plain meaning” unless the applicant has provided a clear definition in the specification.¹ It is unreasonable to include the post 20 as part of the normal definition of “band” as “a thin strip of flexible material used to encircle and bind one object or to hold a number of objects together.”² The post 20 is not part of the “thin strip,” not part of the rail 16 and therefore not part of “the band.” Second, even if it *were* proper to take the rail 16 in combination with the post 20 to meet the term “band,” this rail/column combination is not “contoured downwardly” as required by claim 1. Although the post 20 extends to the floor from the rail 16, the rail/post combination is not “contoured downwardly” because the rail 16 remains level and is not “curved downwardly.” The rail/post combination is at best a band (the rail 16) with a protrusion or extension (the post 20).

¹ MPEP 2111.01; *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989).

² The American Heritage Dictionary, Second College Edition

This contrast can be seen by comparing Figure 1 of the present application (reproduced below) to Figure 5 of Apps (reproduced above).



Applicant's Figure 1

In Figure 1 of the present application, the band 14 is contoured downwardly at the corner, in other words the "thin strip" is "curved" downwardly to the floor at the corner. In contrast, in Apps, the rail is not curved or contoured at all, rather, a post simply projects from the rail at the corner. The Examiner's interpretation of "contoured" and/or "band" is unreasonable.

Not only is the examiner's current interpretation of these terms unreasonable and contrary to the "ordinary definition," it contradicts his initial conclusion in this application. After this application was filed, the examiner responded with a Notice of Allowability (mailed May 7, 2001) and a signed list of references which included the Apps '925 patent. This affirms the reasonableness of Applicant's interpretation of the claims and the claim terms. The examiner has not attempted to explain his reasons for changing his interpretation of the claims or the claim terms.

Claims 2 and 14 further specify that "one said side portion of said band is contoured downwardly and one said end portion is contoured downwardly so as to converge together" to form a band corner portion. Even if the Examiner's rail/post combination were taken to be the claimed "band," there is no side portion of the rail

16 that is “contoured downwardly” or an “end portion” that is “contoured downwardly so as to converge together” as claimed in claims 2 and 14.

The rejection of claims 6 and 13 is also based upon an unreasonable construction of the terms “contoured” and “band.” Claims 6 and 13 specify that the “band is contoured downwardly along the side portions to form a band central portion that directly connects to the floor structure at the side portions of said tray” (claim 6) and that “said band is contoured downwardly along the side portions to form a band side detail that directly connects to the floor structure at the side portions of said tray” (claim 13). Here, the Examiner has combined the rail 16 and posts 18 (similar to his rejection of claim 1), arguing that those are a “band contoured downwardly to the floor structure as required by claim 6 and 13.” Again, this is contrary to the plain meaning of “contoured” and “band” as explained above.

Claim 7 depends from claim 6 and further specifies that the band central portion has a top edge to receive a mating bottom edge of a like tray nested thereabove. Because the rail 16 in Apps does not “contour downwardly” to the floor, the “bottom edge” of one tray does not mate with a “top edge” of a “band central portion” of a like tray below it. Rather, as can be seen in Figure 14 of Apps, a surface that is not the bottom edge of an upper tray mates with a surface that is not the top edge of the band of the lower tray. In other words, because the rail 16 does not contour downwardly, the upper tray *nests within* the rail 16 at the post 20, rather than mating with a top edge of the band, as claimed.

Claims 10 and 17 each specify a rib on an exterior surface of at least one band corner portion, and a platform at an upper edge of a corresponding band corner portion for supporting the rib of an adjacent above-nested tray. The ribs 21 of Apps are not supported on a “platform at an upper edge of a corresponding band corner portion” as claimed. Rather, the ribs 21 of Apps rest on shoulders that are not at “an upper edge of a corresponding band corner portion.” Therefore, claims 10 and 17 are properly allowable.

The examiner has also rejected claims 4 and 8 as obvious over Apps in view of David. The examiner’s proposed modification of the Apps tray to include features purportedly taught by David is inconsistent with the examiner’s application of claim 1 (for example) to Apps. Apparently, the examiner is proposing that David would teach modifying the post 20 of Apps to be v-shaped as shown in David (Figure 6, for example). However, David teaches that the outer ring is still not

contoured downwardly to the floor. The outer ring in David is still level, horizontal and vertically spaced from the floor of the crate, not contoured downwardly to the floor. The proposed v-shaped post would be even more clearly not part of "the band" as claimed, and even more clearly not part of a "band contoured downwardly to the floor" as claimed. Therefore, claims 4 and 8 are properly allowable.

CLOSING

For the above reasons, claims 1-20 are patentable.

Applicant encloses a check in the amount of \$1240 for the Appeal Brief fee (\$320) and a Petition fee for a 3-month extension of time (\$920). Please charge any deficiencies in these fees, or credit any overpayments, to Deposit Account No. 50-1984.

Respectfully submitted,



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Los Angeles, California 90023

Dated: November 18, 2002

Enclosures: (1) Appeal Brief original and 2 copies
(2) check for \$1240 (\$320 Appeal Brief Fee + \$920 Petition for Extension fee)

CLAIMS APPENDIX

1. A low depth nestable tray for containers, said tray having a floor structure with a floor top surface, a floor bottom surface, and a plurality of container support areas on the floor top surface, wherein the improvements comprise:

a low depth wall structure comprising a plurality of columns arranged along the periphery of the floor structure, and further comprising a band having side and end portions spaced above the floor structure and connected to the floor structure by said columns to form a unitary construction, wherein said band is contoured downwardly to form a band corner portion that directly connects to the floor structure at each corner of said tray.

2. The tray of claim 1, wherein each said band corner portion is formed whereby one said side portion of said band is contoured downwardly and one said end portion is contoured downwardly so as to converge together.

3. The tray of claim 2, further comprising a rib on an exterior surface of each said band corner portion, and a platform formed at a top edge of each said band corner portion to support the rib of an above-nested tray.

4. The tray of claim 1, wherein said band is contoured downwardly at an angle of approximately 50°.

5. The tray of claim 1, wherein said band is also contoured downwardly along the side of said tray to form a band side detail that connects to the floor structure at the side of said tray.

6. A low depth nestable tray for containers, said tray having a floor structure with a floor top surface, a floor bottom surface, and a plurality of container support areas on the floor top surface, wherein the improvements comprise:

a low depth wall structure comprising a plurality of columns arranged along the periphery of the floor structure, and further comprising a band having side and end portions spaced above the floor structure and connected to the floor structure by said columns to form a unitary construction, wherein said band is

contoured downwardly along the side portions to form a band central portion that directly connects to the floor structure at the side portions of said tray.

7. The tray of claim 6, wherein said band central portion has a top edge to receive a mating bottom edge of a like tray nested thereabove.

8. The tray of claim 6, wherein said band is contoured downwardly at an angle of approximately 50° to form said band central portion.

9. The tray of claim 6, wherein the band also contours downwardly to form a band corner portion attached to the floor structure.

10. The tray of claim 9, further comprising a rib formed on an exterior surface of at least one band corner portion, and a platform formed at an upper edge of a corresponding band corner portion for supporting the rib of an adjacent above-nested tray.

11. The tray of claim 6, wherein each column has an inner column surface which projects inward, and an outer column surface which is recessed inward to receive therein the inner column surface of an adjacent below-nested tray.

12. The tray of claim 6, wherein the band has a substantially planar inner surface.

13. A low depth nestable tray for containers, having a floor structure with a floor top surface, a floor bottom surface, and a plurality of container support areas on the floor top surface, wherein the improvements comprise:

a low depth wall structure comprising a plurality of columns arranged along the periphery of the floor structure, and further comprising a band having side and end portions spaced above the floor structure and connected to the floor structure by said columns to form a unitary construction, wherein said band is contoured downwardly along the side portions to form a band side detail that directly connects to the floor surface at the side portions of said tray.

Structure

14. The tray of claim 13, wherein one of the side portions of the band is contoured downwardly and one of the end portions of the band is contoured downwardly so as to converge together to define a band corner portion.
15. The tray of claim 14, wherein the band corner portion is integrally attached to the floor structure at each corner of the tray.
16. The tray of claim 13, wherein each column has an inner column surface which projects inward, and an outer column surface which is recessed inward to receive therein the inner column surface of an adjacent below-nested tray.
17. The tray of claim 13, further comprising a rib formed on an exterior surface of at least one band corner portion, and a platform formed at an upper edge of a corresponding band corner portion for supporting the rib of an adjacent above-nested tray.
18. The tray of claim 13, wherein the band side detail is centrally disposed along the length of the side wall.
19. The tray of claim 1, wherein the band has a substantially planar inner surface.
20. The tray of claim 1, wherein each column has an inner column surface which projects inward, and an outer column surface which is recessed inward to receive therein the inner column surface of an adjacent below-nested tray.